

ARAB-MALAYSIAN FINANCE BHD*a***v.****CHAN SAI MEE**

HIGH COURT MALAYA, KUALA LUMPUR

RK NATHAN J

[ORIGINATING SUMMONS NO: S2-24-978-2000]

5 JANUARY 2001

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LAND LAW: Charge - Order for sale - Cause to the contrary - Whether established - Developer's failure to obtain official approval for building plans - Whether sale and purchase agreement rendered void - Whether loan agreement affected - Whether defendant had shown "valid cause to the contrary" - National Land Code, s. 256(3)

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The plaintiff bank applied for foreclosure of the defendant's property that was charged to the plaintiff for a loan of RM165,000, that the plaintiff granted to the defendant. Upon the defendant's default in payment, the plaintiff demanded full repayment with interest.

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The defendant argued that since the building plans had not been approved and neither the developer's license nor the advertising and sales permit had been issued by the ministry, the sale and purchase ('S & P') agreement between the developer and him was illegal. Therefore, the subsequent loan agreement between the plaintiff and him was tainted with illegality and therefore void.

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The issues that needed to be considered were: (1) whether the developer's failure to obtain official approval for the building plans rendered the sale and purchase agreement void; (2) whether the defendant himself did anything to avoid the contract; and (3) whether the facts of the case, upon consideration, show that a successful defence of avoidance was raised by the defendant.

*f***Held:***g*

[1] The developer's failure to obtain official approval provided the defendant the option to either avoid or affirm the S & P agreement. Therefore, the transaction was valid until it was avoided.

[2] Although the defendant should have taken out a summons to avoid the S & P agreement initially, he was still entitled to raise the issue of avoidance when the plaintiff chose to foreclose on the defendant's property.

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a [3] The defendant had not even received the certificate of fitness in respect of his purchase and had indeed requested for a refund of monies paid in his letter to the plaintiff. Upon due consideration of the facts, it can be concluded that the defendant had successfully raised the defence of avoidance.

b [4] This case was between the financier and the purchaser, and the defendant had shown a valid “cause to the contrary” pursuant to s. 256(3) of the National Land Code which warranted a dismissal of the action with costs.

[Application dismissed.]

c **Case(s) referred to:**
Beca (Malaysia) Sdn Bhd v. Tan Choong Kuang & Anor [1986] 1 CLJ 20 (refd)
Kin Nam Development Sdn Bhd v. Khau Daw Yau [1984] 1 CLJ 347 (refd)
Ladang Tai Tak (KT) Sdn Bhd v. Suppiah Andy Thavar & Ors [1999] 6 CLJ 348 (refd)

d **Legislation referred to:**
Contracts Act 1950, s. 24
Housing Developers (Control and Licensing) Act 1966, s. 5(1)
Housing Developers (Control and Licensing) Rules 1960, rr. 11(1), 17
National Land Code, s. 256(3)

e *For the plaintiff - Robin Lim; M/s Azhar & Wong*
For the defendant - Jenny Lee (Chris Chan with him); M/s Isaacs & Partners
Reported by Suresh Nathan

JUDGMENT

f **RK Nathan J:**

Facts

g This is the plaintiff’s application to foreclose all that parcel of residential premises known as Parcel No. B9/C2/27-11, Type C2 measuring approximately 1,099 square feet within Storey No. 27th Floor, Unit 11 of Building Palazzo Zeno, B9, Taman Puteri (Venice Hill Condominium and Golf Resort), Mukim of Ulu Langat together with an Accessory Parcel No. Carpark No. 34 of Building No. Palazzo Zeno, Carpark Level 1 (the said property) belonging to

h the defendant and charged to the plaintiff in respect of a loan of RM165,000 granted by the plaintiff to the defendant at the latter’s request and in respect of which the parties herein entered into a composite loan agreement and assignment on 19 June 1995 (the agreement). Amongst the terms and conditions of the agreement were that:

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- (1) the defendant would pay a monthly sum of RM1,459 for 39 months with a final payment of RM1,284; and *a*
- (2) the interest be fixed at 0.75% per annum above the base lending rate (BLR). *b*

Upon the defendant's default in payment of the instalments the plaintiff sent a notice of demand dated 21 October 1999. Since there was no response the plaintiff sent a second notice on 3 February 2000 demanding the full repayment with interest. The vendor of the said property was in fact the developer named Venice Hill Resort Living Sdn Bhd. Unfortunately the plaintiff had failed to exhibit the sale and purchase agreement entered into between the defendant/ purchaser and the developer/vendor. *c*

Findings Of The Court

It is the defendant's case that the sale and purchase agreement entered into between the defendant and the developer is illegal, because the developer had not, on the date the sale and purchase agreement was executed, obtained the advertising and sales permit issued by the housing and local government ministry (ministry). The defendant exhibited a letter dated 10 November 2000 from the ministry to this effect. The defendant also exhibited a letter dated 21 November 2000 from the Majlis Perbandaran Kajang (the majlis) stating that the building plans for the said property had not been approved as yet because the developer had not paid the fine of RM452,296.60 imposed by the majlis upon the developer. The said letter indicated that the developer's appeal against the imposition of the fine was rejected by the majlis on 24 May 2000. In the circumstances, the letter pointed out that the official approval for the building plans would only be given upon payment of the said fine. Since the building plans had not been approved and since neither the developer's licence nor the advertising and sales permit had been issued by the ministry, the defendant argued that the sale and purchase agreement was illegal and that therefore the said loan agreement which was dependent upon the sale and purchase agreement, was also tainted with illegality and therefore void. *d*
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One of the preambles to the sale and purchase agreement relevant to this case reads as follows:

AND WHEREAS the Vendor has, at its own costs and expense, obtained the approval of building plans (hereinafter referred to as "the Building Plan") from the Appropriate Authority (a copy of the Floor Plan, Storey Plan and Site Plan as certified by the Vendor's architect are annexed in the First Schedule); *h*

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- a* It is clear from the letter dated 21 November 2000 from the majlis that when the sale and purchase agreement was signed on 7 December 1994 the building plans had not as yet been approved. The defendant cited in support the case of *Ladang Tai Tak (KT) Sdn Bhd v. Suppiah Andy Thavar & Ors* [1999] 6 CLJ 348. In that case, the court held that the defendants who constructed a
- b* temple upon the plaintiff's land were mere gratuitous licensees and were therefore held to be trespassing upon the said land. Since the defendants were gratuitous licensees and since their licence could thus be terminated at will the court found that the plaintiff was entitled to a declaration that the defendants' temple structure was illegal and obtained consequential orders
- c* including one for demolishing the temple. I fail to understand how this case can be equated to the one before me. By no stretch of the imagination can it be said that the defendant in the case before me is a gratuitous licensee. His Lordship Abdul Malik Ishak J said at p. 354 of the said judgment as follows:

- d* The plaintiff's stand was quite simple and straightforward. The structures that stood on the temple were built without the approval of the relevant authorities and for all intents and purposes remained illegal.

In fact in his lengthy judgment and after going through the facts and the numerous authorities, the learned judge concluded that:

- e* ... the defendants by its actions in constructing and expanding the area of the prayer site had also breached the terms of the licence that may be implied. Consequently, in law the continued occupation of the plaintiff's land by the defendants can be construed as nothing less than trespassers.

- f* Section 5(1) of the Housing Developers (Control and Licensing) Act 1966 reads as follows:

5. Prohibition against housing development except by virtue of a licence and provisions relating to the grant of a licence.

- g* (1) No housing development shall be engaged in, carried on, undertaken or caused to be undertaken except by a housing developer in possession of a licence issued under this Act.

- h* The defendant relied totally on this section. The defendant contends that the sale and purchase agreement dated 7 December 1994 is illegal because the developer had stated as a fact in the preamble that the said developer had obtained the approval of the building plans from the appropriate authority and in this case the appropriate authority being the majlis, when in fact the said official approval had not to date been obtained. The question is, does this render the said sale and purchase agreement dated 7 December 1994 illegal and thus void. In *Kin Nam Development Sdn Bhd v. Khau Daw Yau* [1984] 1 CLJ 347 the appellant wished to develop two pieces of land. One belonged
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to him and the other to one Futo Trading Company Sdn Bhd (Futo). The appellant invited bookings and all the lots were booked before approval for conversion and subdivision of the land was obtained. When the appellant applied for conversion and subdivision, this was granted subject to the condition that a number of the lots ought to be reserved for Bumiputras. The appellant thus decided not to build any of the houses and action was brought by some of those who had booked the lots claiming specific performance of the contract. In respect of the land that belonged to Futo, the appellant argued that since Futo, being the proprietor of the land, was not made a party to the booking transactions, whatever contracts that arose therefrom, were illegal by virtue of r. 11(1) of the Housing Developers (Control and Licensing) Rules 1970 - PU(A) 268/1970, and therefore null and void. The said r. 11(1) reads as follows:

11.(1) No licensed housing developer who is not the proprietor of the land upon which a housing development is carried out shall enter into any contract of sale of any housing accommodation in that housing development unless the proprietor of the land is also a party to such contract of sale and agreed to the sale of the land for the purpose specified in such contract of sale.

Rule 17 provides for the prosecution of the housing developer for a breach of the said rule. The then Federal Court held that since neither the Act nor the rules say anything with regard to the effect of such a breach upon the contract then the only relevant provision the court ought to consider ought to be s. 24 of the Contracts Act 1950. The said section reads as follows:

24. The consideration or object of an agreement is lawful, unless -

- (a) it is forbidden by a law;
- (b) it is of such a nature that, if permitted, it would defeat any law;
- (c) it is fraudulent;
- (d) it involves or implies injury to the person or property of another; or
- (e) the court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Notwithstanding the fact that such a substantial question of law and fact was not pleaded, the court said at p. 186 as follows:

In any case there is nothing illegal about the consideration or object of the contracts because they are only contracts for the sale and purchase of houses,

- a* and neither do they come within any of the paragraphs of section 24 quoted above, although the appellant may well be guilty of an offence under Rule 17 for contravening Rule 11(1) of the Housing Developers (Control and Licensing) Rules, 1970. In other words, these Rules do not affect the validity or otherwise of the contracts which the developer has signed with the purchasers.
- b* In *Beca (Malaysia) Sdn Bhd v. Tan Choong Kuang & Anor* [1986] 1 CLJ 20 the appellants were housing developers. The respondents had agreed to buy three units of flats from the appellants and paid a deposit of \$20,000. The deposit was made before the issuance of the developer's licence to the appellants. The respondents subsequently refused to sign the sale and purchase agreement and claimed a refund of the deposit. The learned president of the sessions court held that the deposit was meant to be a booking fee and not part payment. The appellants had not obtained the licence and permit at the time of collecting the deposit and therefore they were not authorised to collect the deposit. He therefore ordered the refund of the deposit. An appeal to the High Court was dismissed. The then Supreme Court held that the agreement was valid but was voidable at the instance of the buyers and that since the buyers had elected to avoid the agreement, they were entitled to claim for the return of the deposit. This is what the court said at p. 30 of the judgment:
- e* Having regard to the scope and purpose of the Enactment and the Rules made thereunder, they are clearly made for the benefit of a class of people, namely, the house buyers. The duty of observing the law is firmly placed on the housing developers for the protection of the house buyers. Hence, any infringement of the law would render the housing developers liable to penalty on conviction. Although the developers have to comply with a number of statutory requirements we are unable to find anything in the Enactment or the Rules
- f* which would invalidate an agreement or contract as a result of any breach of the Enactment or the Rules. On the facts of this case we are of the view that the transaction is valid until it is avoided.
- The court gave the option to the buyers to avoid or to affirm the contract. The reason why the then Supreme Court held that the agreement or the provisional agreement as the court called it, ought not to be declared illegal was because "it might in a given situation prove profitable to the developers, for instance, when there is a housing boom". The question for this court now is to see whether the defendant in this case did anything to avoid the contract. Firstly, the defendant himself ought to have taken out a summons to avoid
- g* the contract. This he did not do. But ought that to be held against the defendant. Ought the defendant to be penalised for raising his avoidance only when the plaintiff chose to foreclose. I do not think it would be fair to hold it against the defendant and penalise him for failing to move *suo moto*. He is in my view entitled to raise the issue of avoidance at this stage of the proceedings. It is interesting to refer to the letter dated 10 November 2000
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from the Ministry wherein, having stated that in respect of the affected parcel of land the developer had not as yet obtained the licence or the advertising and sales permit, the said letter concluded with this paragraph:

2. Untuk makluman tuan seterusnya, penjualan rumah-rumah yang telah memperolehi Sijil Layak Menduduki, tiada Lesen Pemaju dan Permit Iklan dan Jualan diperlukan.

Whether the ministry can make such exemptions is another issue. But even so, can the plaintiff show that in this case the defendant has been given the certificate of fitness in respect of his purchase. Unfortunately, the plaintiff has not done so. On the contrary the defendant has in his reply affidavit exhibited his letter dated 10 August 2000 and addressed to the plaintiff and marked exh. G in which the defendant had expressly stated that in respect of his apartment “the certificate of fitness is still pending”. In fact in the said letter the defendant has indeed requested for the refund of monies paid amounting to RM12,433.73. In his police report made on 31 October 2000 (exh. C to encl. 9) the defendant has again maintained that he had not been issued with the certificate of fitness.

Having considered the facts of the case before me, I am inclined to hold that the defendant has successfully raised the defence of avoidance.

There is yet another issue that I must consider. In both the cases referred to in my judgment the matter arose between the developer and the purchaser. In this case it is between the financier and the purchaser. In my view the defendant has shown a valid “cause to the contrary” pursuant to s. 256(3) of the National Land Code to warrant a dismissal of this action with costs.

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